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# Supreme Court of the United States

OCTOBER TERM, 1939

No. 236

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UNITED STATES OF AMERICA, for the use and benefit of MIDLAND LOAN FINANCE COMPANY, a Corporation,

*Petitioner (Plaintiff-Appellant below),*

vs.

NATIONAL SURETY CORPORATION, a Corporation, and PATRICK J. MALONE,

*Respondents (Defendants-Appellees below).*

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## BRIEF OF RESPONDENT MALONE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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## BRIEF OF RESPONDENT MALONE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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### STATEMENT OF THE CASE.

### I.

#### A. NATURE OF ACTION INVOLVED.

This is an action on contract and not one sounding in tort.

This is an action on contract, namely, on an acting Postmaster's bond.

At page 2 of Petitioner's Petition, and Brief, it is incorrectly stated that this is an action brought on an acting Postmaster's bond "to recover damage sustained * * * through the acting postmaster's tortious misdelivery of mail."

It is not an action against a postmaster sounding in tort as intimated. The Circuit Court of Appeals so indicates as shown by the following language:

> "It will be observed that this is *not an action against a postmaster sounding in tort.* * * * It is an action on a bond by a stranger to the contract brought without the consent of the obligee."

Further the opinion of Judge Nordbye so indicates:

> "The action was brought by the plaintiff, Midland Loan Finance Company, in the name of the United States, as above indicated, to recover damages against the principal and surety on a postmaster's bond * * *. The complaint sought to recover the sum of $34,997.03 against the principal and $16,000.00 against the surety. Subsequently, the plaintiff limited its right to recover against both defendants to the amount of the bond" (70).*

Plaintiff in open Court, as above stated by Judge Nordbye, limited its amount of claim against Malone to the amount of the bond, that is Sixteen Thousand Dollars (63).

The action, both in the lower Court and the Circuit Court of Appeals, was tried on the theory that this was an action on a contract, the bond in question, and not one sounding in tort as suggested by petitioner. It is elementary law that plaintiff after trial and appeal cannot shift or change his theory of liability and urge a new theory not before suggested.

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*Note: Unless otherwise indicated, the figures in parentheses refer to pages of the printed record.

B. THE DAMAGES CLAIMED BY PLAINTIF ARE CONSEQUENTIAL.

Petitioner states that this action is brought to recover *damages sustained.* This statement is inaccurate in this, that the action was one to recover *consequential damages,* and should be so characterized.

This action was not commenced to recover the value of the letters sent, but to recover the loss sustained by petitioner because of forgeries and other criminal acts perpetrated by one Hunting (3-18).

The Circuit Court of Appeals indicated by the following language that it considered petitioner's action as one seeking consequential damages:

> "On this appeal a single question of law is presented. It is: May a private sender of mail through the United States mails maintain an action, without the consent of the government, upon the official bond of an acting postmaster *to recover consequential damages* resulting from the delivery of mail to one other than the addressee without the written consent of the sender?" (102)

C. ORDER OVERRULING DEMURRERS.

Defendants interposed separate Demurrers to plaintiff's complaint. They were overruled by Judge Joyce (25-30).

At page 3 of the petition it is incorrectly stated that Judge Joyce based his decision on the *Howard case* (184 U. S. 676). Judge Joyce's decision, in part, reads:

> "The defendants insist that consent of the Government to maintain the action is a prerequisite and that the damages are not proximate but remote. While the questions presented by the two demurrers are questions of law, and while doubt may exist as to the right of the Midland Company to maintain the action in the name

of the United States, the case of U. S. vs. Howard, 184 U. S. 676, involving recovery on a United States District Court Clerk's bond where Government consent was not obtained, seems to support the Midland Company's claim. On argument it appeared that the Midland Company had notified the Attorney General of the United States of the pendency of the action. It further appeared that Malone, following the events here recited, was made a regular postmaster. * * *

"Not being prepared at this time to say that a cause of action does not exist, and viewing the matter as one of Federal Law, and believing that with the submission of all the evidence a just determination can then easily be ascertained, and not attempting here an analysis of the cases presented by the very able briefs submitted, I have concluded that the demurrers should be overruled." (29)

Clearly Judge Joyce did not rule as claimed. In fact, the most he said was that there was doubt whether such right of suit by the Midland Company existed but that he felt that after submission of the evidence a just determination could be more easily ascertained.

The defendants interposed separate Answers (30-34) and the case came on for trial. At the close of the testimony separate motions for dismissal and directed verdict were made by each defendant, the Court reserving its ruling on said motions (62-63). Thereafter on separate formal motions after verdict, the Court granted the reserved motions (70-88). The action as against the Surety Company was dismissed "on the merits", on the grounds that plaintiff had no right to sue on this postmaster's bond (70-87). The Court also dismissed the action as to this defendant on the ground that if no right of action on the bond existed against the Surety Company, then the Court had no jurisdiction of

this defendant since plaintiff and this defendant were both citizens and residents of the State of Minnesota (88). Thereafter judgment was entered upon the above orders of dismissal in favor of said defendants and each of them. Appeal therefrom was taken (91-99) and determined adversely to petitioner by the Circuit Court of Appeals (101-107). Petition for rehearing was made (109-114) and denied (115).

## STATEMENT OF FACTS.

### A. Facts Stated By Circuit Court of Appeals.

The statement of facts set forth by the Circuit Court of Appeals is correct, and incorporated herein by reference (102-103).

Petitioner criticizes the statement of that Court that it is not claimed that the postmaster "had any knowledge of the fraud that was being perpetrated by Hunting," and claims that the same should be qualified, by stating that the testimony did not directly "establish that Malone was knowingly a party to the fraud."

The language of the Circuit Court of Appeals in this respect is as follows:

> "It is not claimed that any of the lost funds came into the possession of the acting postmaster, or that he had any knowledge of the fraud that was being perpetrated by Hunting." (103)

The record indicates this statement of the Circuit Court of Appeals is correct. Plaintiff's complaint charges the defendant Malone as follows:

> "Notwithstanding said duties and trusts, but wholly disregarding the same, and in violation of the United States Postal Laws and regulations and in breach of the

aforesaid bond, Exhibit A, defendant Malone and his said assistants and subordinates regulary, customarily, wilfully, negligently, and wrongfully delivered to said Hunting all of the mail communications and letters" (16).

Although the foregoing language is extremely exhaustive, at no place does the plaintiff *claim*, or *directly charge* the defendant Malone with knowledge of the fraud.

In his opening statement to the Court and Jury, counsel for petitioner was asked the following:

"Mr. Butler: I am asking whether or not I am to understand from your opening statement to the Court of what you intend to prove—whether the Court and Jury are to understand that you do not intend to prove corrupt motives on the part of Mr. Malone as averred in your complaint, and that is all I am asking. I have a right to know. I have an issue tendered me by the complaint, and I want to know whether it will be proven.

"Mr. Deinard: I would like to oblige Mr. Butler, but I don't think I can commit myself any further than I have.

"Mr. Butler: If your Honor please, at the conclusion yesterday afternoon, in order to make certain that the plaintiff had in mind pressing what he stated he intended to prove, I directed a question to him as to whether he intended to prove that this Postmaster here, in acting as it is claimed that he did, acted from corrupt motives in participating with Hunting in an effort to defraud the plaintiff, or whether it is the plaintiff's claim that the Postmaster was without corrupt motives, careless or negligent merely in the performance of whatever the regulations might require. To that query the defendant received no direct answer. Your Honor will readily appreciate that it makes a difference in the defense of the case whether one is called upon to

defend an action sounding in deceit or fraud, or one of negligence. The complaint sets forth one of those forms. The tender of proof to the Court suggests that another type of action will be presented. I wish, with your Honor's permission, to inquire whether this second type or whether the complaint relied upon will be proved. I think it is a fair question.

"The Court: Well, as I understood Mr. Deinard's statement, he said he did not think it made any difference whether his actions were prompted by a corrupt motive or by mere careless actions. I am not in a position to have counsel amplify their opening statements. I assume they stand on their pleadings.

"(fol. 56) Mr. Deinard: Well, I say, your Honor, it is not because I have any intention not to give counsel as categorical an answer as I can, but I don't know what Mr. Butler means by the use of the word 'Corruption.' So far as I am informed, now, without going through every word of the complaint, the word is not used in the complaint in connection with the defendant Malone" (46-47).

Further the opinion, in part, of Judge Nordbye, reads as follows:

"The testimony indicated that Malone knew of Hunting's business relations with the plaintiff, but it did not directly establish that Malone was knowingly a party to the fraud. Apparently, Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and he was able to convince Malone that it was perfectly proper for the 'Midland mail' to be delivered to him. However, by reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff" (72).

Thus Judge Nordbye, the trial judge, states the evidence did not directly establish Malone was knowingly a party to the fraud. His opinion does not state, as counsel would intimate, that the circumstantial evidence indicated that Malone did know of the fraud. Therefore, the statement of the Circuit Court of Appeals to the effect, "It is not claimed that he, (the postmaster), had any knowledge of the fraud being perpetrated by Hunting," is correct in view of the complaint, the statements of counsel for petitioner, and the statement of Judge Nordbye.

B. Merits of the Case Are Not Reviewable Beyond the Question of the Right of Plaintiff to Maintain An Action Upon the Bond.

At page 2 petitioner states that the jury finds the Postmaster misdelivered mail in violation of the Regulations, and that plaintiff sustained a loss of at least Sixteen Thousand Dollars.

The verdict of the jury was not involved in the decision of either Court and was not reviewed by the Circuit Court of Appeals. It is not before this Court. Motion was made to dismiss the action by defendant Surety Company, and by this defendant, after the close of the testimony, and before rendition of the verdict. The Court (with consent of all parties) reserved its rulings thereon, until after the verdict (63).

Consequently, although the trial court's decision was made after the verdict, it must be considered to have been made at the time of the motion, that is nunc pro tunc. Thus the verdict, or its effect, is not before this Court on this petition and is of no significance.

Further the verdict of the jury has no bearing upon the question involved, because it was merged in the judgment that was vacated, and set aside, by the trial court (88).

C. THE BOND.

At page 8 of the petition, petitioner sets forth the condition of the bond. The petition omits the following important fact, as stated by the Circuit Court of Appeals, namely:

> "The bond, given by the defendants as principal and surety, bound them, "*to pay to the United States of America, the sum of Sixteen Thousand Dollars*" (103).

D. STATUTES INVOLVED.

Under the heading of "Statutes Involved", the petitioner respondent cites two statutes, namely, 39 U. S. C. A. Sec. 34 and 5 U. S. C. A. Sec. 377.

The following statute is of such importance that it was cited by the Circuit Court of Appeals in its opinion as follows:

> "All suits * * * arising under the postal laws shall be brought in the name of the United States," 28 U. S. C. A. #732 (104).

Statutes of further importance not cited by petitioner are those found in 39 U. S. C. A. Sections 34 to 44, inclusive, and can be found in the foot note of Judge Nordbye's opinion (75-76). Also 5 U. S. C. A. Sec. 22.

E. REGULATIONS.

At page 9, under the heading "Regulations Violated by Postmaster" petitioner sets forth several sections of the Postal Regulations.

In view of this fact, and because peculiarly connected with the question involved, this defendant deems it necessary to set forth a quotation from the opinion of the Circuit Court of Appeals as follows:

> "The Postal Laws and Regulations, Edition of 1932, provide:
>
> "Section 777. 1. Mail Matter should be delivered to the person addressed or in accordance with his written order.
>
> "2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office.
>
> Section 816 provides for recovery of loss due to wrongful delivery from the postal employee responsible therefor by the Chief Inspector by proceedings in the department, and that,
>
> "7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear". (104).

The mail matter involved in this case was delivered pursuant to sub-section 2 of Section 777, which states that the postmaster may deliver mail matter to the person claiming the addressee has verbally given him authority to receive it unless he doubts the authority, in which case he may require written authority from the addressee.

The Circuit Court by the following language inferentially recognized that the postmaster in the absence of doubt might properly deliver mail matter on oral authority:

> "*If it be assumed* that the postmaster breached the bond by failing to require Hunting to file with him the written order of the addressee before delivering the letters in accordance with the provisions of section 777 of

> the Postal Regulations it does not follow that appellant is entitled to maintain the action" (104).

This was one of the questions raised throughout the trial and preserved by the Motions for Directed Verdict (61-63).

Further Judge Nordbye's opinion and decision indicates that no question was considered save and except the question of the coverage of the bond and of plaintiff's right to sue thereon. The Court said:

> "The Court is of the opinion, that if the right to sue on the bond existed, it would have jurisdiction, but a further discussion of the other grounds presented in the motion (fol. 133) becomes unnecessary in view of the conclusions indicated" (87).

In addition to the foregoing, various references are made in Judge Nordbye's order, to other provisions of the postal laws and regulations, and companion statutes (102-103).

F. Relation of Government to Bond.

The petitioner, at page 10 of its petition, under the heading, "Government's Relation to Bond" states that there is no contention on the part of the government, that any one other than petitioner, asserts any claim against the bond here involved, or that potential claims exist against it.

It is to be noted that this statement is not supported by any reference to the record to support this statement. In fact the record does not indicate any such fact. The record does indicate that petitioner sought permission from the United States to sue on the bond in the name of the United States, but this permission was denied by the Attorney General and no consent to this suit was ever given by the United States. (57-60).

Further the record indicates that the United States District Attorney filed a brief amicus curiae in support of the contention that petitioner had no right to bring this action on this bond. See: Opinion of Judge Nordbye (84).

## ARGUMENT.

In his Brief, under the heading of "Argument" petitioner sets forth the following contentions:

1. The Circuit Court of Appeals has decided important questions of federal law which have not been, but which should be settled by this Court.
2. The Circuit Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court.
3. The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal on the same matter.
4. The decisions of the Circuit Court of Appeals is in conflict with its own decisions on the same matter, in cases cited below.

All of the petitioner's arguments (Petition pp. 19 to 36 inclusive) are fully answered in the defendant Surety Company's Brief herein. Any further discussion of them herein would be needless repetition, and the arguments as contained in said Brief are incorporated herein by reference the same as if fully set forth herein.

## CONCLUSION.

It is unnecessary to point out the great importance of this case to this defendant. The right claimed by plaintiff strikes at every postmaster. It goes to the heart of the entire postal

system. If a postmaster can be held personally responsible for every consequential loss arising from an unintentional misdelivery of mail matter, no responsible person will assume the office or continue in it. If every postmaster can be subjected to the personal expense of litigation of this kind for damages as remote and speculative as those here asserted, there is no incentive to accept appointment or continue as postmaster. If a postmaster, sued as such for alleged misconduct in his office by a private citizen, cannot obtain the protection of the arm of the governmental service in which he operates and the services of the United States attorney in his defense, he is at a distinct disadvantage in that the action of his superior officers absolving him from the alleged misconduct can be ignored and their action excluded from consideration by either court or jury. In short, under the Postal Laws and Regulations the postmaster is prohibited from disclosing matters coming to his attention as postmaster (except on specific permission from his superiors) and yet, by reason of the same regulations, documentary or other proof necessary for his protection and defense is in the sole possession of his superiors in the Post Office Department. These factors should weigh heavily in any effort to find a "legal intendment" in the Postal Laws and Regulations permitting a suit of this kind.

Respectfully submitted,

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